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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-756

HARRY SMITH, et al.,

Petitioners,

v.

DAWN SMITH, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION ROCKINGHAM COUNCIL OF WEEK-DAY RELIGIOUS EDUCATION

OPINION BELOW

In an opinion reported at 523 F.2d 121 (August 26, 1975), the United States Court of Appeals for the Fourth

Circuit reversed the decision of The United States District Court for the Western District of Virginia, which decision is reported at 391 F. Supp. 443 (1975).

JURISDICTION

Jurisdiction is founded on 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

(1) Whether this Court's recent decisions under the Establishment Clause of the First Amendment to the Constitution involving a variety of church-state relationships have so eroded the basis of *Zorach* v. *Clauson*, 343 U.S. 203 (1952), that all release time programs are unconstitutional.

(2) Whether the program by which children attending Harrisonburg, Virginia public schools are released during school hours to attend religious instruction given at a mobile classroom and church buildings located adjacent to, but not on, school property is, on its facts, unconstitutional.

STATEMENT OF THE CASE

Petitioners' statement of the case is nothing more than a paraphrasing of the Appellate Court's restatement of the District Court's statement of the facts. To avoid the minor errors and mischaracterizations that have crept into Petitioners' paraphrased statement, Respondent urges this Honorable Court to refer to the lower courts' factual statements, which Respondent regards as more accurate.

REASONS FOR DENYING WRIT

1. This Honorable Court has already decided the federal question presented herein. *Zorach* v. *Clauson*, 343 U.S.

203 (1952). Moreover, the facts in the instant case are so similar to those in *Zorach* that the District Court admitted that they were "not readily distinguishable." *Smith* v. *Smith*, 391 F. Supp. 443, 450 (W. D. Va. 1975). The U. S. Court of Appeals for the Fourth Circuit agreed and decided the case squarely on the basis of *Zorach*. *Smith* v. *Smith*, 523 F.2d 121, 124 (4th Cir. 1975).

2. Petitioners argue that *Zorach* is no longer viable or controlling law. Yet, as recently as six months ago, the *entire* Court joined together in Part II of an opinion by Mr. Justice Stewart and twice cited *Zorach* with approval. *Meek* v. *Pittenger*, 421 U. S. 349, 359 (May 19, 1975). It defies belief that this Honorable Court would unanimously agree to cite *Zorach* if that case were obsolete and invalid. Thus, a lengthy and time-consuming re-examination of *Zorach* is not warranted.

3. The *Meek* opinion explicitly states that "not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution." *Meek* v. *Pittenger*, 421 U. S. 349, 359 (May 19, 1975), citing *Zorach*. Here the School Board of Harrisonburg, Virginia, adjusts the public schools' schedules to accommodate the religious needs of school children whose parents request in writing that their children be permitted to participate in weekday religious education (WRE). Permission is granted pursuant to a general policy of accomodating parents' desires for their children to be excused from public school discipline for any legitimate reason. No public funds are appropriated for WRE's use. The State is in no way involved in the administration of the program. No tax-supported public classrooms are turned over to WRE for its use as centers of religious instruction. Rather, as under the facts in *Zorach*, the School Board only indirectly and incidentally benefits the religious program. This, your Respondent submits, is not unconstitutional under *Zorach* or inconsistent with the tripartite test stated in *Nyquist*.

4. Finally, there is no conflict of opinion between circuits as to a substantial federal question. On the contrary, one circuit merely followed the dictates of a Supreme Court decision that was cited with apparent approval by this Honorable Court as recently as three months beforehand. Your Respondent respectfully submits that the unanimous decision of the U. S. Circuit Court of Appeals for the Fourth Circuit is not in error.

CONCLUSION

For the reasons set forth above, the Writ of Certiorari should be denied.

Respectfully submitted,

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ROCKINGHAM COUNCIL FOR WEEK-DAY
RELIGIOUS EDUCATION

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 1975, 3 copies of Respondent Rockingham Council for Week-Day Religious Education's Brief in Opposition to Writ of Certiorari were mailed, first class postage prepaid, to Robert P. Dwoskin, 1224 West Main Street, Charlottesville, Virginia 22903; Richard E. Crouch, Crouch, Morse and Knight, 2304 Wilson Boulevard, Arlington, Virginia 22201; and Melvin L. Wulf, American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016, Counsel for Petitioners.

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